BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RONALD J. PARRENT Claimant VS. **SZ MOWING SERVICE** Respondent AND **TRAVELERS INDEMNITY CO.** Insurance Carrier	)	Docket No. **1,045,729**

ORDER

Respondent and its insurance carrier request review of the July 14, 2009 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The disputed issue at the preliminary hearing was whether claimant was respondent's employee or an independent contractor when he suffered accidental injury. The Administrative Law Judge (ALJ) found claimant was respondent's employee on the date of accident. The ALJ further ordered respondent to provide medical treatment and temporary total disability benefits.

Respondent requests review and argues claimant was an independent contractor because he could set his own hours, had control over the manner of work being performed, was not provided any benefits and had no tax withheld from his paychecks.

Claimant requests that the ALJ's Order be affirmed as he was respondent's employee. Claimant argues that he was paid an hourly wage, directed where to work each day, provided a company shirt to wear, and used respondent's equipment.

The sole issue on this appeal is whether claimant was an employee of respondent or an independent contractor at the time of the accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Respondent is a landscaping business owned by Steve Zimmerman. When claimant was laid off from his employment with RTI on October 31, 2008, he contacted Mr. Zimmerman that same day and asked for a job. Claimant was offered work and was told he would be paid $8.50 an hour. Claimant was provided a work shirt with respondent's name on it. It is disputed whether Mr. Zimmerman told claimant that he would be an independent contractor. The parties agree that claimant was paid for the hours worked and nothing was withheld from his paycheck. Nor was claimant provided any benefits.

On November 1, 2008, claimant began work. He testified that the crews would meet at the shed where respondent's equipment was stored and would be provided a list of jobs by Mr. Zimmerman. Claimant's job duties included mowing grass, landscaping, edging, picking up trash and snow removal. Later on he started spraying herbicides and also trimming trees.

Claimant testified that the truck, trailer and equipment were provided by Mr. Zimmerman. On April 27, 2009, claimant was working with a tree cutting crew that was removing trees for a rural electric contract. Mr. Philip Webb was in charge of this crew and claimant received instructions from him. Claimant had stepped behind the truck pulling the wood chipper in order to shut down the chipper. Mr. Webb started to drive the truck pulling the wood chipper and claimant was knocked down by the wood chipper which then ran over his legs and feet.

Claimant was transported to the hospital and diagnosed with left homalateral Lisfranc dislocation, second and third metatarsal neck fractures, right distal tibia and fibula fracture which is comminuted, and left great toe metatarsal phalangeal joint dislocation. Dr. J. Stanley Jones performed an open reduction internal fixation of the left foot Lisfranc injury and an open reduction with percutaneous fixation of the second and third metatarsal neck fractures on the left foot as well as a left great toe first metatarsal phalangeal joint closed reduction. The doctor took claimant off work as of April 27, 2009. At the time of the preliminary hearing, claimant was not able to bear any weight on his legs and feet.

It is often difficult to determine in a given case whether a person is an employee or an independent contractor because there are elements pertaining to both relationships which may occur without being determinative of the relationship.[1] There is no absolute rule for determining whether an individual is an independent contractor or an employee.[2] The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.[3]

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[1] *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

[2] *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

[3] *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.[4]

In this instance, Mr. Zimmerman would provide the work crews with a list of work and the job sites where the work was to be performed. When claimant was on the mowing crew the list contained the locations where the lawns were to be mowed. The truck and trailer as well as the lawn mowers, weed eaters and grass blowers all were respondent's equipment. Likewise, when claimant was on the tree trimming jobs, the crew used respondent's equipment and wore shirts with respondent's name. The same workers were on the crews with respondent and Mr. Zimmerman agreed he used the same five people although he stated they were subcontractors and not employees. Mr. Zimmerman, respondent's owner, testified:

> Q. And then what you do is you, once you are awarded a contract you set up the time and the place that the work is going to be done, you set that up with your customers; is that correct?
>
> A. I set up a sheet, a list of what they need to do and I give it to them. I don't set no time.
>
> Q. I am referring to your customers, not your employees. The time that you are going to mow someone's house, for instance, you set that up with the customers; is that correct?
>
> A. I set up the day, I do not set up a time.
>
> Q. And the address that the job is to be performed at, that's information the employees receive from you; is that correct?
>
> A. Yes.
>
> Q. And, in fact, you write that down in a list and hand that to them each day; is that correct?
>
> A. Yes.
>
> Q. And the people that work these contracts are expected to take your list and go and perform the work that you have contracted to be performed for the customers; is that correct?
>
> A. Yes.

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[4] *Wallis* at 102-103.

Q. And in the case of mowing, when Mr. Parrent was on the mowing crew, he would show up at the shed and receive the list from you and go out and perform the mowing duties; is that correct?

A. Yes.

Q. And when he went out and performed those mowing duties he would use your mowers; is that correct?

A. Yes.

Q. He would use your edgers to perform the job; is that correct?

A. Yes.

Q. And they would use your trailers to pull the equipment to the job sites; is that correct?

A. Yes.[5]

In addition to the right to control and the right to discharge the worker, the other commonly recognized tests of the independent contractor relationship are:

1. The existence of a contract to perform a certain piece of work at a fixed price.

2. The independent nature of the worker's business or distinct calling.

3. The employment of assistants and the right to supervise their activities.

4. The worker's obligation to furnish tools, supplies and materials.

5. The worker's right to control the progress of the work.

6. The length of time that the worker is employed.

7. Whether the worker is paid by time or by job.

8. Whether the work is part of the regular business of the employer.[6]

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[5] P.H. Trans. at 34-36.

[6] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

The claimant was hired to perform landscaping that was the regular business of respondent. Claimant did not furnish any tools and was paid by the hour. Mr. Zimmerman would, on a daily basis, meet with the crews in the morning and tell them where they would work that day. The determination of the quality of the work fell squarely on respondent.

This Board Member concludes for the above reasons that claimant should be considered an employee for the purposes of the Workers Compensation Act, rather than an independent contractor. Therefore, the ALJ's Order awarding claimant benefits should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[8]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated July 14, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of September 2009.

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DAVID A. SHUFELT
BOARD MEMBER

c: Phillip B. Slape, Attorney for Claimant
William L. Townsley, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

[7] K.S.A. 44-534a.

[8] K.S.A. 2008 Supp. 44-555c(k).